

Iqbal (Migration) [2017] AATA 1184 (28 June 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Zafar Iqbal
CASE NUMBER:	1612022
DIBP REFERENCE(S):	BCC2015/1324461
MEMBER:	Maira Brophy
DATE:	28 June 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 28 June 2017 at 4.06 pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Genuine and continuing relationship – Inconsistent evidence – Cumulative effect of inconsistencies – Not in committed relationship with the sponsor

LEGISLATION

Migration Act 1958, ss. 5F, 5CB, 65

Migration Regulations 1994, Schedule 2, cl 820.211, cl 820.221, r 1.15A(3)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 22 July 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 7 May 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 and more specifically cl. 820.211(2)(a) of Schedule 2 of the Regulations because the delegate was not satisfied on the evidence the parties were in a genuine and continuing relationship.
4. The applicant, Mr Zafar Iqbal appeared before the Tribunal on 18 May 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, Ms Shereen Kumar and from Ms Hazra Bibi, Ms Samia Tabal and Mr Chahid Choudry. The Tribunal hearing was conducted with the assistance of an interpreter in the Urdu and English languages.
5. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
7. *Background*
8. The applicant was born on 4 May 1985 in Pakistan. He has declared no previous relationships. His father is deceased and his mother resides in Pakistan. He has one sister in the UK, a brother in Australia and a brother in Pakistan.
9. The applicant's sponsor was born in Suva, Fiji on 5 January 1983. She has declared no previous relationships. Her parents are in Australia as are her two sisters and one brother.
10. The parties stated they met at Campbelltown Shopping Centre on 9 March 2013. According to their application form they commenced a de facto relationship in September 2014 when they moved in together at the sponsor's parents' home in Liverpool. They were married in a civil ceremony at Parramatta on 22 December 2014 and they held a Nikkah ceremony on 30 April 2017.
11. On 7 May 2015 the applicant lodged an application for a Partner (Temporary)(Class UK) Subclass 820) visa and a Partner (Residence)(Class BS) (Subclass 801) on the grounds of being in a spousal relationship with an Australian citizen Ms Shereen Kavita Kumar (the sponsor).

12. In the Record of Decision, a copy of which the applicant provided to the Tribunal, the delegate stated he was not able to be satisfied the nature of the household was that of a genuine spousal couple, or that the visa applicant was the spouse of the sponsor as defined under section 5F and 5CB of the Migration Act.
13. Prior to the hearing the applicant provided documents to the Tribunal including but not limited to the following; submission, bank statements from accounts in each name as well as account held in both names, medical records of sponsor, evidence as to joint tenancy, internet accounts, electricity accounts, miscellaneous bills, hotel and travel bills from trip to Fiji.

Tribunal Proceedings

14. The issue in the present case is whether the applicant and his sponsoring spouse were at the time of application in a genuine relationship and whether at the time of application they continue to be in a genuine relationship.
15. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files as well as the oral evidence provided at the hearing by the applicant, her sponsor and the witness and the submissions received after the hearing.
16. There were a number of inconsistencies in the evidence given at the time of hearing and these inconsistencies were put to the parties following the hearing in accordance with section 359A of the Act. The Tribunal explained the relevance and the consequences of relying on that information. The discrepancies were as follows:
 - At the time of hearing the visa applicant said he and the sponsor had resided with the sponsors parents but her parents moved out of the unit they were living in in January or February 2016. This was not consistent with the evidence given by the sponsor who told the Tribunal she and the visa applicant resided with her parents but her parents moved out of the unit they were living in in June 2015.
 - At the time of hearing the visa applicant said that last week he worked Monday, Wednesday and Thursday from 6 pm to 6 am and this week he worked Monday and Tuesday from 6pm to 6 am. This was not consistent with the evidence given by the sponsor who said the visa applicant is employed on a casual basis as a security guard working 20 hours per fortnight. When asked what hours he worked last week she said he had worked Monday, Tuesday and Wednesday for seven hours each day working from 6pm to 12 am. When asked what hours he worked this week she said he worked Monday and Tuesday from 6 pm to 12 am.
 - At the time of hearing the visa applicant told the Tribunal that he first met the sponsor outside Kmart at the Campbelltown Shopping Centre. This was not consistent with the evidence given by the sponsor that she met the visa applicant for the first time at Michel's Patisserie at Campbelltown Shopping Centre.
 - At the time of hearing the visa applicant told the Tribunal at the time he first met the sponsor he was living with his brother at Campbelltown. This was not consistent with the evidence given by the sponsor that at the time of her first meeting the sponsor he was living with his brother and his family at Botany.
 - At the time of hearing the visa applicant told the Tribunal that at the time the parties commenced an intimate relationship the sponsor was living at her sister's place. This

was not consistent with the evidence of the sponsor that she had moved from her sister's place to the unit when she and the visa applicant commenced an intimate relationship.

- At the time of hearing the visa applicant told the Tribunal that his second date with the sponsor was to see an Indian movie at Campbelltown . This was not consistent with the evidence of the sponsor who said the second date she went on with the visa applicant was to McDonalds at Lakemba.
- At the time of hearing the visa applicant said about fifty people attended the civil marriage between he and the sponsor. This was not consistent with the evidence of the sponsor who said about thirty people attended the civil marriage at Parramatta.
- At the time of hearing the visa applicant he had purchased a motor vehicle for \$7500 at the end of February 2017 and he had taken \$7000 out of the joint account for that purchase. This was not consistent with the evidence given by the sponsor that the visa applicant had recently purchased a car for \$12,000 and the money had come out of their joint account.
- At the time of hearing the visa applicant told the Tribunal that the sponsor had travelled to Fiji alone in August 2016 to have teeth implants and that she had withdrawn money for the dental work from the joint account but he was unsure how much. He said she had travelled alone again in January 2017 to see a friend who was very ill. The visa applicant said the only other time the sponsor had been to Fiji during the time they had been together was when he and the sponsor had gone to Fiji in May/June 2016 for a holiday. This was not consistent with the evidence of the sponsor that she had taken money out of the joint account to fly to Fiji about a month ago as she had a friend who was very sick. She said her only other trip had been to Fiji in May 2016 for 21 days. She had gone on this trip with the visa applicant.

17. The visa applicant was given the opportunity to address those inconsistencies as outlined above. A further submission from the visa applicant was received at the Tribunal on 24 March 2017. Those submissions have been taken into account.

CONSIDERATION OF CLAIMS AND EVIDENCE

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

18. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the

nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

20. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 22 December 2014 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

21. *Financial*
22. The visa applicant told the Tribunal the parties are currently living in rented accommodation. They pay \$270 per week and the tenancy and the utilities are in both his name and the name of the sponsor. The rent is shared on a 50/50 basis and the visa applicant pays the utility bills.
23. The visa applicant is currently employed on a casual basis as a security guard. He generally works three to four days per week. His hours are variable as security services are provided 24 hours a day. He earns between \$700 and \$800 per week which is paid into an account in his name. The sponsor is not in paid employment. She is in receipt of a disability support pension from Centrelink and she receives \$540 per fortnight. She has also been in receipt of payments from One Path Life Ltd which is a fund attached to her superannuation which she is entitled to because she is not able to work.
24. The visa applicant has an account in his name. The sponsor does not have access to his account. From his account he transfers his share of the rent to the sponsor each fortnight and she pays the rent by electronic funds transfer (EFT) from her account. The visa applicant pays groceries and the utility bills out of his account. The sponsor has her Centrelink benefit paid into an account in her name and the visa applicant is not able to access her account. In addition to her share of the rent the sponsor pays the phone bills.
25. The parties have an account in joint names which they both transfer into. The sponsor transfers \$100 per fortnight into the account and the visa applicant transfers money he receives from a Pakistani Community group. Both parties are able to access that account. The parties gave evidence of the visa applicant having withdrawn funds from that account for the purchase of a car and according to the visa applicant the sponsor had recently withdrawn funds for travel to Fiji. The Tribunal notes in the period of the sponsor's most recent trip to Fiji deposits of around \$2200 were made into the sponsor's account from the joint account. The sponsor said funds from that account in the amount of \$10000 were used for their Nikkeh. The Tribunal notes an amount of \$4000 was transferred from the joint account into the sponsor's account on 10 April 2017 but the Tribunal was unable to ascertain what those funds were used for as it did not have statements from the sponsors account for that period.
26. There was limited intermingling of financial resources by way of the savings account which they had both accessed for individual purposes. The Tribunal was concerned the sponsor was not able to recall the amount accessed by the visa applicant for the purchase of a car with any specificity and the parties had differing recollections as to the reason the sponsor had accessed the savings. Apart from the rent and utilities there was no evidence of shared financial obligations.

27. In weighing all of the available evidence regarding the financial aspects of the parties' relationship, the Tribunal finds it is not clearly indicative of whether the parties are, or are not, a couple in a genuine relationship.

28. *Nature of the household.*

29. The parties gave consistent evidence they had resided together since September 2014. They initially resided with the parents of the sponsor but have been on their own since June 2015.

30. At the time of hearing the parties gave consistent evidence they share the housework, and doing the shopping. The sponsor does the majority of the cooking and the cleaning.

31. The Tribunal accepts the parties reside as part of the one household. However the Tribunal was not convinced on the evidence the parties were living together in a genuine relationship.

32. On the basis of the evidence the Tribunal was not able to distinguish between a situation where the visa applicant and sponsor are living as a couple, or alternatively one where the visa applicant and the sponsor were sharing a home until the visa applicant obtained a visa.

33. *Social Aspects of the Relationship*

34. At the time of application the visa applicant and his sponsor provided two relationship statements very briefly outlining the history and nature of the relationship. Prior to hearing another seven relationship statements were provided. The Tribunal accepts on the basis of the statements and the photographic evidence that the parties have socialised together with members of their immediate families and some mutual friends.

35. In considering the social aspects of the parties' relationship the Tribunal considered the evidence given at the time of hearing by the mother of the sponsor and the brother and sister in law of the visa applicant. They gave evidence of regularly seeing and spending time with the sponsor and visa applicant. The parties gave evidence of having recently spent time in Queensland with the sponsor's family for a birthday celebration. On the basis of the evidence given at the time of hearing the Tribunal is satisfied the relationship of the parties is accepted by their families.

36. After considering all the information regarding the social aspects of the parties' relationship, the Tribunal is satisfied their relationship is supported by their families and some friends. The Tribunal is not satisfied the parties have established that at the current time they present to the community at large as two people in a genuine relationship.

37. In weighing all of the available evidence regarding the social aspects of the parties' relationship, the Tribunal finds , on balance, it is indicative of a couple in a genuine relationship.

38. *Nature of the commitment*

39. The evidence as to the parties commitment to each other was, when considered in its totality confused and unconvincing. There were a number of inconsistencies in the parties' oral evidence and these mainly related to financial and family issues. The lack of knowledge of those matters displayed by the visa applicant was not indicative of person in a genuine relationship.

40. The parties were not able to give specific evidence as to when the sponsor had travelled to Fiji outside the visit they undertook together in May/June 2016. The sponsor told the Tribunal she had only been to Fiji once other than with the sponsor but the visa applicant said she had been twice. The Tribunal does not regard it as plausible the parties would not remember with some specificity such important details, particularly given the stated purposes of the trips (dental work and visiting a sick friend) and the impact of such travel on their finances. Such confusion may be understandable in the context of a friendship but less so in the context of people claiming to be in a genuine relationship. The Tribunal was concerned there was a lack of candour in the giving of the evidence by both parties in an attempt to present their relationship as being a genuine and continuing relationship.
41. The sponsor was unfamiliar with the working patterns of the visa applicant. She was not able to recall with any specificity the hours the visa applicant had worked in the week prior to the hearing. The inconsistencies in the evidence were put to the visa applicant after the hearing in accordance with the requirements of section 359A and the Tribunal has considered the explanations provided. The Tribunal does not regard the explanation given to be persuasive. It is not plausible that you would not know with some specificity the hours the visa applicant worked especially when it meant he was away during the evening if the parties reside as they claim to be i.e. members of a couple it is a reasonable expectation that you would know if your partner was home during the night or at work. The Tribunal was concerned there was a lack of candour in the giving of the evidence by both parties in an attempt to present their relationship as being a genuine and continuing relationship. The Tribunal regarded the submissions as attempts to reconstruct evidence in a more favourable light. The Tribunal is mindful it is the ability to recall the minutiae of daily events, as being indicative of a genuine and continuing relationship, where parties are as they claim to be members of the same household.
42. The sponsor was unfamiliar with the details as to the history of the relationship, where they had gone on their second date, where the visa applicant was residing at the time they commenced dating and the number of people who attended their civil wedding ceremony. Those inconsistencies in the evidence were put to the visa applicant after the hearing in accordance with the requirements of section 359A and the Tribunal has considered the explanations provided. The Tribunal does not regard the explanation given to be persuasive. Conflicts and lack of specificity in the evidence about such events are in the Tribunal's view either indicative of the event not taking place or it not taking place in the manner described.
43. The Tribunal regarded the cumulative effect of the inconsistencies in the evidence of the parties as being indicative of the relationship not being characterised by a mutual commitment to a shared life together. The Tribunal places considerable weight on this evidence as it indicates either the parties do not communicate as claimed or they do not know each other as well as parties in a committed relationship would.
44. In the absence of any additional evidence from the parties there is insufficient evidence before the Tribunal to indicate that the applicant and his sponsor have lived together in a genuine and continuing relationship, that they provide one another with companionship and emotional support, or that they see the relationship as long-term.
45. The Tribunal is not satisfied that the parties were, at the time of application, or are currently in a genuine spousal relationship. The Tribunal is not satisfied on the evidence that the applicant and his sponsor are committed to a shared life as husband and wife to the exclusion of all others.
- 46.

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49. **CONCLUSION**

50. Given the above findings, the Tribunal is not satisfied that at the time the visa application was lodged and at the time of this decision the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. There is no evidence to establish the parties do not live together at the present time at the same residential address. I am however not convinced the applicant resides at this location in a committed relationship with the sponsor, rather than as an individual person who is not in a committed relationship.

51. Upon considering the evidence before the Tribunal and on the basis of the findings previously made the Tribunal is not satisfied the applicant has established he is currently living in a genuine and committed spousal relationship with the sponsor.

52. Given these findings the Tribunal, on balance, is not satisfied that at the time of this decision the parties are in a genuine relationship.

53. Therefore, the visa applicant does not meet cl.820.211(2)(a) and therefore does not meet the requirements of cl.820.211. Consequently, he cannot meet cl.820.221.

54. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

55. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Maira Brophy
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).